87-975

Supreme Court, U.S.
FILED
OCT 28 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. _____

In The
SUPREME COURT OF THE UNITED STATES

_____ **TERM, 1987**

GENE SCROGGY, *et al., Petitioner,*

v.

DANIEL C. SUMMERS, *Respondent*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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October 12, 1987

38pgs

QUESTIONS PRESENTED

1. Whether a parolee's due process rights are violated when recommitment of the parolee to prison on a new felony sentence received for commission of a crime while on parole automatically terminates his parole status on any sentence on which he has not received a final discharge, or a restoration of civil rights, prior to the date of recommitment?

PARTIES TO THE PROCEEDINGS

The parties to the proceedings below were the Petitioner, Daniel C. Summers, and the Respondents, Gene Scroggy, et al.

The Respondents before this Court include Kennedy, Nelson, and Weber.

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Kentucky Revised Statute 439.352 2,4,8

No. _____

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GENE SCROGGY, *et al., Petitioner,*

v.

DANIEL C. SUMMERS, *Respondent*

_____

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

_____

The Petitioner, Gene Scroggy, et al, respectfully prays that a Writ of Certiorari issue to review the Judgment and Opinion of the United States Court of Appeals for the Sixth Circuit, entered in the above-entitled proceeding on July 31, 1987.

OPINIONS BELOW

The Order of the United States Court of Appeals for the Sixth Circuit entered on August 31, 1987 not recommended for full-text publication is reprinted in the Appendix hereto, page A-1, infra. The Order of Dismissal and Magistrate's report of the

United States District Court for the Western District of Kentucky at Louisville (Edward H. Johnstone) is reprinted in the Appendix hereto, page B-1, infra.

JURISDICTION

The Order of the United States Court of Appeals for the Sixth Circuit declaring Kentucky's statute unconstitutional was entered on August 31, 1987. See page A-1, infra. This Court's jurisdiction is invoked under 28 U.S.C. §1254 (1).

STATUTES INVOLVED

The statute whose construction is here at issue is Kentucky Revised Statute 439.352 which states:

> "Recommitment of a parolee to prison on a new sentence received for commission of a crime while on parole shall automatically terminate his parole status on any sentence in which he has not received a final discharge, or a restoration of civil rights prior to the date of recommitment. The prisoner shall, at the time of the recommitment on the new sentence, begin to accrue additional time credit toward conditional release or expiration of sentence on the sentence on which he had previously been paroled unless he has

been finally discharged from parole on the sentence or has been restored his civil rights prior to the date of the recommitment."

STATEMENT OF THE CASE

Respondent filed a pro se Petition for a Writ of Habeas Corpus in the United States District Court for the Western District of Kentucky at Louisville. His Petition for a Writ of Habeas Corpus was ordered filed by Order of United States Magistrate W. David King on June 10, 1986. Respondent contended in his Petition for a Writ of Habeas Corpus that he was being unlawfully incarcerated at the Kentucky State Penitentiary near Eddyville, Kentucky. Specifically, he alleged that his parole status was illegally revoked by the Kentucky Parole Board. Respondent contended that the revocation of his parole status, based upon his recommitment to state custody for new felony crimes committed while on parole, denied his right to due process of law. He also alleged that the Kentucky Parole Board impermissibly revoked his parole status when in fact the Respondent's obligations under that parole had been satisfied and the parole was, in effect, non-existent. Thereafter, the Petitioners filed an Answer to the Petition for Writ of Habeas

Corpus and tendered a Motion to Dismiss. The United States Magistrate entered an Order directing that the parties expand the record to include documentation concerning Respondent's final discharge from parole and copies of the relevant statutes or regulations outlining the procedures and requirements for the granting of final parole discharge. Both parties filed their supplementations to the record per the Magistrate's earlier Order requesting such supplementation. Thereafter, the Magistrate entered his recommendation to the District Court Judge that the Petition for a Writ of Habeas Corpus be dismissed. Respondent filed Exceptions to the Magistrate's Report and Recommendation. The District Court adopted the Findings and Recommendations of the Magistrate and dismissed the case. Respondent then filed Notice of Appeal to the Sixth Circuit Court of Appeals from the District Court's Order of Dismissal and denial of Respondent's Petition for a Writ of Habeas Corpus.

The Sixth Circuit Court of Appeals held Kentucky Revised Statute 439.352 unconstitutional. The Court held that Kentucky's statute violated Respondent's due process rights to a hearing. The Court vacated the District Court's Judgment on that particular issue and remanded for the Order of a revocation

hearing in Respondent's case within a reasonable time.

REASONS FOR GRANTING THE WRIT

I. The Court Should Grant The Writ To Resolve A Conflict Among The Circuits.

The Sixth Circuit's decision that states are prohibited from automatically revoking parole without giving the parolee a final hearing, even if the revocation was predicated on the parolee's conviction of a felony committed while on parole, is in direct conflict with a recent Fifth Circuit decision on the same issue. In *Pickens v. Bulter*, 814 F.2d 237 (5th Cir. 1987), the Court held when state law prescribes mandatory revocation of parole upon a parolee's conviction of another crime, the state is not required to give such a parolee a final revocation hearing.

The Sixth Circuit bases its decision on the holding in *Morrissey v. Brewer*, 408 U.S. 471, 487-488 (1972). The Sixth Circuit held that *Morrissey, supra,* requires that all parolees be given a final hearing prior to parole revocation. However, as *Pickens, supra,* correctly held, and as the Supreme Court has held in *Black v. Ramano*, 471 U.S. 606, 105 S. Ct. 2254, 85

L.Ed.2d 636 (1985), *Morrissey, supra,* did not consider the hearing requirements of "a revocation hearing proceeding in which the fact-finder was required by law to order incarceration upon f ding that the defendant has violated a condition of ... parole". *Id.* at p. 612.

The Sixth Circuit's decision is directly at odds with the better reasoned Fifth Circuit decision. *Pickens, supra,* relying on *Black, supra,* should be the law for all lower courts. As such, consideration of the matter by this Court is essential.

II. The Decision Below Declaring State Law Unconstitutional That Prescribes Manadatory Revocation of Parole Upon a Parolee's Conviction of a New Felony Crime Raises Important And Unresolved Problems.

The Sixth Circuit has held that states are prohibited from automatically revoking parole without giving the parolee a final hearing, even if the revocation was predicated on the parolee's conviction of a felony committed while on parole. As previously stated, the Court bases its ruling on the teaching of *Morrissey v. Brewer, supra.* In *Morrissey,* the Supreme Court held that a parolee's liberty "is valuable and must be seen as within the protection of the Fourteenth Amendment" and that its

termination required "some orderly process, however informal". *Id.* at p. 482. The Court required this informal process "to assure that the finding of a parole violation will be based on verified facts and that the exercise of discretion will be informed by an accurate knowledge of the parolee's behavior". *Id.* at p. 484. *Morrissey, supra,* also required the state to conduct a final revocation hearing within a reasonable time after the parolee is taken into custody. The purpose of this hearing is to give the parolee an opportunity to show that he did not violate parole conditions or if he did, that the violation does not warrant revocation. *Id.* at p. 488.

However, *Morrissey* does not prohibit states from imposing a mandatory, automatic revocation of parole if the parolee is convicted of a new felony. As previously stated, in *Black v. Ramano, supra*, the Supreme Court held that *Morrissey, supra,* did not consider the hearing requirements of "a revocation hearing proceeding in which the fact-finder was required by law to order incarceration upon finding that the defendant had violated a condition of ... parole". *Id.* at p. 612. "Thus, the Court's discussion of the importance of the informed exercise of discretion did not amount to a holding that the fact-finder in a revocation hearing must, as a matter of due process, be granted

discretion to continue ... parole". *Id.* at p. 643.

As pointed out by the Fifth Circuit in *Pickens, supra,* "our reading of *Black* persuades us that the Court in *Morrissey* did not hold that a state is prohibited from declaring that parole will be automatically revoked for serious violations such as conviction of a felony. *Black* also teaches that it is only when the fact-finder has discretion to continue parole that the parolee is entitled to show an excuse for the violation or that revocation is not appropriate". *Id.* at p. 239.

In *Pickens, supra,* as in this case, if state law mandates parole revocation on new felony convictions and if there is no discretion to continue parole, the parole board should not be required to give a final revocation hearing. Clearly, Kentucky Revised Statute 439.352 does require revocation following a new felony conviction and the parole board has no discretion to continue parole.

For obvious reasons, this should be the proper reading of the law. If a court of competent jurisdiction has determined after hearing any and all mitigation that the parolee has to offer that sufficient evidence exists to prove beyond a reasonable doubt that the parolee is guilty of committing a new felony, then there is certainly sufficient evidence, namely, the new felony conviction

records, to establish that the parolee has violated the terms of his parole by receiving the new conviction. While *Morrissey, supra,* fails to prescribe the standard of proof which due process requires in probation and parole final revocation hearings, it does suggest that guilt beyond a reasonable doubt, the test used in criminal trials, is not necessary. The Court stated:

> "The state has an overwhelming interest in being able to return the individual to imprisonment without the burden of a new adversary criminal trial if in fact he has failed to abide by the conditions of his parole." *Id.* at p. 483. "We emphasize there is no thought to equate the second stage of parole revocation to a criminal prosecution in any sense." *Id.* at p. 489.

Respondent's right to due process of law was satisfied in the Circuit Court proceedings which resulted in his recommitment to state custody. This was a condition precedent to the revocation of Petitioner's parole under the Kentucky statute that the Sixth Circuit has declared unconstitutional. Respondent was provided in those proceedings with all the minimum requirements of due process that is required by *Morrissey, supra.* The Court in *Black, supra,* stated:

> Neither *Gagnon* nor *Morrissey* considered a revocation proceeding in which the fact-finder was required by law to order incarceration upon finding that the defendant had violated a condition of probation or parole. Instead, those cases involved administrative proceedings in which revocation was at

> the discretion of the relevant decision-maker. See *Morrissey,* 408 U.S., at 475, 33 L.Ed.2d 484, 92 S. Ct. 2593; *Id.,* at 492-493, 33 L.Ed.2d 484, 92 S. Ct. 2593 (Douglas, J., dissenting in part); Wis. Stat. Ann, §5703 (1957) (statute involved in *Gagnon*). Thus, the Court's discussion of the importance of the informed exercise of discretion did not amount to a holding that the fact-finder in a revocation proceeding must, as a matter of due process, be granted discretion to continue probation and parole. *Id.* at p. 643.

The lower courts need guidance from this Court in determining the applicability of *Morrissey, supra,* to state statutes that impose a mandatory, automatic revocation of parole if the parolee is convicted of a new felony committed while on parole. The Court in *Black, supra,* held that *Morrissey, supra,* did not hold that a state is prohibited from declaring that parole will be automatically revoked for serious violations such as conviction of a felony. According to *Black, supra,* it is only where the fact-finder has discretion to continue parole that the parolee is entitled to show an excuse for the violation or that revocation is not appropriate.

CONCLUSION

In view of the foregoing, a Writ of Certiorari should issue to the United States Court of Appeals for the Sixth Circuit, so that

this Court may resolve the important issue raised in this Petition.

October 12, 1987

Respectfully Submitted,

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APPENDIX A

OPINION OF THE COURT OF APPEALS

July 31, 1987

BEST AVAILABLE COPY

No. 87-5064

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

July 31, 1987

DANIEL C. SUMMERS,
Petitioner-Appellant,

v.

GENE A. SCROGGY and ATTORNEY GENERAL OF KENTUCKY,
Respondents-Appellees.

ORDER

Before: Kennedy and Nelson, Circuit Judges; and Weber, District Judge.*

The petitioner moves for counsel on appeal from the district court's judgment denying his petition for a writ of habeas corpus filed under 28 U.S.C. §2254. This appeal has been referred to a panel of the court pursuant to Rule 9(a), Rules of the Sixth Circuit. After an examination of the record and the briefs, this panel agrees unanimously that oral argument is not needed. Rule 34(a), Federal Rules of Appellate Procedure.

The petitioner is a Kentucky state prisoner. He challenges the Kentucky Parole Board's imposition of the remainder of his two concurrent life sentences. He raises *ex post facto* clause and

due process issues. He exhausted his state remedies.

The district court relied upon a 1980 Kentucky parole regulation when deciding the *ex post facto* clause issue. 501 Ky. Admin. Reg. 1:015. Because the petitioner was convicted in 1966 and was released from active parole supervision in 1975, we conclude that the application of the 1980 regulation would raise a serious *ex post facto* clause issue. *Weaver v. Graham,* 450 U.S. 24, 31 (1981). Therefore, we will not affirm the district court's decision of this issue on the basis of the 1980 regulation.

However, the district court's decision on this issue can be affirmed on another ground. *Russ' Kwik Car Wash, Inc. v Marathon Petroleum co.,* 772 F.2d 214, 216 (6th Cir. 1985). The applicable parole regulation was enacted in 1975. The issue then becomes whether this state law creates a liberty interest. *Greenholtz v. Inmates of the Neb. Penal and Corr. Complex,* 442 U.S. 1, 7 (1979). The language in the 1975 regulation states:

> The Director of the Division of Probation and Parole reserves the right to refuse to recommend restoration of civil rights even though the above conditions have been fulfilled.

This language is not the mandatory language necessary to create a liberty interest under *Greenholtz,* 442 U.S. at 12. Therefore, the regulation in effect at the time in question in this case did not

grant a liberty interest to the petitioner concerning his final discharge from parole. So the district court's judgment on the first issue in this case can be affirmed.

The petitioner's second issue attacks Ky. Rev. Stat. §439.352 as unconstitutional. This statute automatically terminates parole when the parolee is convicted of a new crime and is sentenced to prison. The petitioner argues that this statute violates his due process rights to a hearing. *Morrissey v. Brewer,* 408 U.S. 471, 487-88 (1972). The petitioner is correct. In *Moss v. Patterson,* 555 F. 2d 137, 138 (6th Cir.) (per curiam), *cert. denied sub nom., Kette v. Moss,* 434 U.S. 873 (1977), an Ohio parole regulation did not grant a hearing to any parolee convicted of another crime. This court held that the Ohio regulation did violate the due process rights established in *Morrissey.* The court reasoned that a parolee still must be allowed the opportunity to present evidence in mitigation. 555 F.2d at 138. The court vacated the district court's denial of the petition and remanded the case to order a revocation hearing within a reasonable time.

The holding in *Moss* controls the decision in this case. Therefore, we vacate the district court's judgment on this issue and remand for the order of a revocation hearing in the petitioner's case within a reasonable time.

The motion for counsel is denied. The order of the district court is affirmed in part and vacated and remanded in part. Rules 9(b)(5) and (6), Rules of the Sixth Circuit.

ENTERED BY
ORDER OF THE COURT

ISSUED AS MANDATE: 8/31/87

COST: None

s/John P. Hehman
CLERK

* The Honorable Herman J. Weber, U.S. District Judge for the Southern District of Ohio, sitting by designation.

APPENDIX B

ORDER OF DISMISSAL AND MAGISTRATE'S REPORT

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

DANIEL C. SUMMERS,
Petitioner,

v. **CIVIL ACTION**

GENE A. SCROGGY,
Warden **No. C86-0485-L(J)**
Respondents-Appellees.

ORDER OF DISMISSAL

This matter was referred, pursuant to 28 U.S.C. 636, to the United States Magistrate for consideration and report on the petition for writ of habeas corpus filed by the petitioner pursuant to 28 U.S.C. 2254. The magistrate has filed his report and recommendation, to which the petitioner has filed objections.

After considering the petitioner's objections and conducting a *de novo* review of the record, the court finds that the magistrate's recommendation should be accepted.

IT IS ORDERED AND ADJUDGED:

1. The findings of fact and conclusions of law contained in the magistrate's report dated December 15, 1986 are hereby adopted by this court and incorporated into this order by

reference.

2. The petition for writ of habeas corpus is DENIED and this action is DISMISSED.

Dated: 12/31/86

s/ Edward H. Johnstone
EDWARD H. JOHNSTON,

Chief Judge

United States District Court

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

DANIEL C. SUMMERS,
Petitioner,

v. **No. C86-0485-L(J)**

GENE A. SCROGGY,
Warden,
Respondent.

MAGISTRATE'S REPORT

This matter is before the Court on the petition for writ of habeas corpus of the petitioner. The respondent has filed an answer to the petition and each party appears to have complied with the Order for Expansion of Record entered by the undersigned on September 26, 1986, to the best of his ability. The Magistrate has completed review of the record as a whole and submits the following report.

The petitioner is presently a resident of the Kentucky State Penitentiary, Eddyville, Kentucky. In his petition herein, the petitioner is challenging his present custody pursuant to two concurrent life sentences imposed upon him in the Jefferson Circuit Court on or about February 23, 1966. The material historical facts appear to be undisputed and are summarized

below.

As a result of his conviction of two counts of armed robbery, the petitioner was sentenced to serve two concurrent life sentences within the Kentucky Department of Corrections. According to the petitioner's Resident Record Card submitted by the respondent as an exhibit to his answer to the petitioner, the petitioner was paroled from custody by the Kentucky parole board on April 18, 1973. During the term of his parole, the petitioner gained employment and reported as directed by his parole officer. During August of 1975, the petitioner was informed by his parole officer that he no longer was required to report to the parole officer and, according to the petitioner, the officer told him that " ... from this day on you know (sic.) longer have to report to my office, you're on your own now!" On or about August 28, 1975, the Division of Probation and Parole of the Bureau of Corrections sent a letter to the petitioner. This letter informed the petitioner that he was being released from active parole. It informed the petitioner that the letter did not constitute a *final discharge* from parole and that he could terminate his liability resulting from his sentences by obtaining either his final discharge or restoration of his civil rights. He was urged to obtain one or the other as soon as he became eligible and

was told that his parole officer could assist him in obtaining either. (See exhibit C to the respondent's answer.) The petitioner admits that he did not take any affirmative steps to be released from his parole liability. See page 2 of his affidavit filed in support of his supplementation of the record filed herein on October 20, 1986. Further, the petitioner did not supply the Court with a copy of his certificate of final discharge as ordered in the Order for Expansion of Record entered on September 26, 1986.

By Judgment of Conviction and Sentence entered on February 2, 1983, in the Jefferson Circuit Court, Louisville, Kentucky; the petitioner, on a plea of guilty, was sentenced to serve a total of 10 years on 15 counts of Criminal Possession of a Forged Instrument in the Second Degree and one count of being a first-degree persistent felony offender. See Exhibit B of respondent's answer.

The petitioner was recommitted to the custody of the state department of corrections when he arrived at the Kentucky State Reformatory on March 11, 1983. (See petitioner's resident card referred to above.) On an unspecified date and several months after the petitioner had been transferred to the Kentucky State Penitentiary, the petitioner was informed that the parole on his

two life sentences had been revoked. The petitioner did not receive a hearing prior to revocation of his parole.

This Court has jurisdiction over the subject matter of this action pursuant to 28 USC 2254 and the petitioner has exhausted available state remedies as to the grounds raised herein. Both of the grounds raised herein are without merit and do not suggest that the petitioner is being held pursuant to the two life sentences in violation of his federally protected rights. Each ground shall be discussed below.

The petitioner first alleges that the revocation of his parole on the two sentences denied him his right to due process. Kentucky Revised Statutes (KRS) 439.352 provides in pertinent part as follows:

> Recommitment of a parolee to prison on a new sentence received for commission of a crime while on parole shall automatically terminate his parole status on any sentence on which he has not received a final discharge, or a restoration of civil rights, prior to the date of recommitment.

As we have stated earlier in this report, the petitioner admits that he had not received his final discharge or restoration of his civil rights. The petitioner's due process rights were satisfied by the criminal proceedings which resulted in the recommitment which was a condition precedent to the revocation of the

petitioner's parole under the statute.

Finally, the petitioner asserts that the Kentucky Parole Board revoked the petitioner's parole when in fact the petitioner's obligations under that parole had been satisfied and the parole was "non-existent (sic.)". In order to analyze the merits of this position, we need only to look at the Kentucky statutory and regulatory law. Title 501 of the Kentucky Administrative Regulations address those responsibilities and duties of the Kentucky Parole Board referred to by the petitioner in his petition. 501 KAR 1:015 provides the guidelines for the granting of final discharge after obligations of parole have been met. This regulation provides, in part, as follows:

> Section 1(2) - On sentences greater than five (5) years up to and including a life sentence, the parolee shall be entitled to a final discharge from parole upon the receipt, by the board, of a full report of the parolee's activities while on parole from the parole officer, assuming clear conduct from the date of parole release, upon service on parole of one-half (1/2) of the time remaining from his parole release date to his maximum expiration date, or ten (10) years, whichever is shorter.
>
> ...
>
> Section 2 - Upon receipt of evidence that a parolee has satisfied all requirements of Section 1 of this regulation, the chairman shall issue, or cause to be issued, a certificate of final discharge from parole.

As the petitioner was sentenced to two life sentences, he would not be eligible for a final discharge earlier than 10 years after he

was paroled.

This regulation has been promulgatd pursuant to Kentucky Revised Statutes (KRS) 439.354, et.seq. Specifically, KRS 439.356 provides:

> After final discharge has been ordered and a certificate issued by the board, or after the parolee's civil rights have been restored by an act of the governor, the parolee may not be held again for a violation of that parole.

A reading of the above regulations and statutes demonstrates that the petitioner's failure to actively seek and obtain his certificate of discharge or the restoration of his civil rights has resulted in his continuing liability under the terms of his parole. Perhaps the petitioner can take some comfort in the fact that he was not eligible for final discharge at the time of his recommitment because his date of recommitment (March 11, 1983) was 9 years, 10 months, and 23 days subsequent to his release on parole (April 18, 1983). Nevertheless, the fact that the petitioner had not been issued a certificate of final discharge as required by statute and regulation is dispositive of the petitioner's argument. Copies of the regulations and statutes referred to in this paragraph are appended to the respondent's response to the Magistrate's Order for Expansion of Record.

Based on the foregoing, the Magistrate RECOMMENDS that the petition for writ of habeas corpus herein be DISMISSED.

Dated: 12/15/86

s/ W. David King
W. DAVID KING
United States Magistrate

NOTICE

Pursuant to Title 28 USC 636, and Rule 6(e) of the Federal Rules of Civil Procedure, the parties shall have thirteen (13) days from the date of service to file written objections to the foregoing report with the Clerk of the Court. A copy shall be served on the undersigned at P. O. Box 826, Paducah, Kentucky 42001. Failure of a party to file timely objections shall constitute a waiver of the right to appeal by that party.

Date of Service: 12/15/86

s/ W. David King
W. DAVID KING
United States Magistrate